

THE CODE COMPLIANCE PANEL OF PHONEPAYPLUS

TRIBUNAL DECISION

Thursday 22 January 2009 TRIBUNAL SITTING No. 19 / CASE 1
CASE REFERENCE: 743643/CB

Information provider & area:	Antiphony Limited, Buckinghamshire
Service provider & area:	Wireless Information Network Limited Buckinghamshire
Type of service:	Text Chat and Contact and Dating
Service title:	Sex Dates
Service number:	69003 / 69844 / 89727 / 89949
Cost:	£1.50 per message received
Network operator:	All Mobile Networks
Number of complainants:	106

THIS CASE WAS BROUGHT AGAINST THE INFORMATION PROVIDER UNDER PARAGRAPH 8.7 OF THE CODE

BACKGROUND

PhonepayPlus received 106 consumer complaints in respect of the receipt of unsolicited chargeable text messages, reportedly sent from short codes and 076 mobile long numbers, which cost £1.50 per message received.

The service was called 'Sex Dates' and was also branded as 'Hot Dates' and 'Adult Dates'. The service marketed itself initially by sending promotional SMS messages from short codes. An example of a promotional message is:

'Make hot dates sexy with singles in ur area now! Reply NOW to start 18+ only. Free reg then just 75p per text rply STOP to quit. AL Helpline 08714742804'

If the recipient did not respond within 30 minutes, a 'Teaser' SMS message was sent from a mobile long number in an attempt to entice users into responding to the service. For example:

'Hiya sexy! Im feeling down and lonely and need some lovin to cheer me up. Can you help? It can be our secret ;-) terms in previous message'

Complainants reported that they had been misled into believing that the SMS messages sent from the mobile long numbers, were genuine mobile numbers.

The Executive's understanding of how the service was supposed to operate:

The Sex Dates service operated as an 18 plus adult text chat and contact and dating service. All users were vetted by moderators, prior to being given access to chat to users. This verification was carried out by the moderator, who requested the user to provide their age in response to the free SMS sent from the mobile long number.

The service was operated by a mix of genuine female users and live moderators, the genuine female users were sourced from advertisements in magazines targeted at females. The purpose of the live moderators was to provide the age vetting service prior to

registration, and to provide an outlet to male users only interested in engaging in sexual stimulation.

Once the consumer had provided their age in response to the verification process, they were sent a free confirmation message from the short code, for example:

69003 *'You have submitted an age of 33 and are eligible to chat & date. You have now been registered to the service, to stop reply STOP. Helpline 08714742804'*

This message was immediately followed up by a message from a mobile long number which enticed the consumer to engage in chat, for example:

+447624800252
'Thanks babe, I wanna pass some good time with you, do u wanna, I am only 34'

If the consumer replied to this message, they were able to engage in chat with either a genuine user or a live moderator, depending on how the service interpreted their intended usage.

The consumer was then sent the first billed message sent from the short code at a charge of £1.50, for example:

69003
'Yr message has been sent to KATHRYN. Please be patient she will reply directly to you. To meet other girls in yr area reply MORE'

Immediately after receipt of the billed message, the user received a response from the female with whom he was corresponding, sent from a mobile long number. The service continued in this manner until the 'STOP' command was sent, at which point billing ended.

The Executive monitored the service on three occasions in May and early July 2008.

Complaint Investigation

The Executive conducted the matter as a standard procedure investigation in accordance with paragraph 8.5 of the PhonepayPlus Code Practice 11th Edition (amended April 2008). The matter later became an information provider case.

In a letter to the service provider dated 16 June 2008, the Executive made a request for information under paragraph 8.3.3 of the Code. On 2 July 2008, the Executive received a partial response from the service provider, which included a response supplied directly from the information provider. The Executive received an additional response on 4 July 2008 and the final response on 7 July 2008, which included revenue statistics for the service.

In a letter dated 15 July 2008, the Executive made a second request for information from the service provider. On 23 July 2008, the Executive extended the deadline for response at the service provider's request, until 28 July 2008. On 28 July 2008, the Executive received a direct response from the information provider, which had been copied to the service provider. On 29 July 2008, the Executive received an email from the information provider, explaining that SMS logs had been incorrectly added to data provided.

In a letter to the service provider dated 29 August 2008, the Executive raised potential breaches of paragraphs 5.2, 5.4.1a, 5.7.1, 5.8, 5.12 and 7.3.3b of the Code. On 2 September 2008, the Executive received an email from the information provider which stated that it was engaged in seeking ongoing compliance from the Executive, and that in light of

the breaches formally raised, had ceased to promote the service. On 2 September 2008, the Executive granted the service provider an extension of time to respond, until 12 September 2008. On 15 September 2008, the Executive received a formal response from the information provider, which had again been copied to the service provider.

On 16 September 2008, the Executive became aware of a further 16 complaints in respect of the service operating on short code 89949 and sent a further request for information to the service provider. Upon receipt of the appropriate undertaking forms on 26 September 2008, the Executive agreed to proceed directly against the information provider under paragraph 8.7 of the Code, which it confirmed in a letter to the parties dated 30 September 2008.

In a letter dated 24 September 2008, the Executive received a response to its further request for information in respect of short code 89949, directly from the information provider. In a letter dated 30 September 2008, the Executive received call logs from the information provider.

In a letter dated 17 October 2008, the Executive issued an addendum to its formal investigation. In an email to the Executive dated 30 October 2008, the information provider explained that it did not feel it could add anything further to the investigation at this stage, but that it would endeavour to respond to the addendum.

On 17 October 2008, the Executive wrote to the information provider, offering it the opportunity to produce further evidence in respect of the consumer opt-ins supplied, and later granted an extension of time for a response. The information provider failed to respond prior to the case appearing before the Tribunal.

The Tribunal made a decision on the breaches raised by the Executive on 22 January 2009.

SUBMISSIONS AND CONCLUSIONS

ALLEGED BREACH ONE

LEGALITY (Paragraph 5.2)

“Services and promotional material must comply with the law. They must not contain anything which is in breach of the law, nor omit anything which the law requires. Services and promotional material must not facilitate or encourage anything which is in any way unlawful.”

Under Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003, it is an offence to send unsolicited promotions using electronic mail (including text messages) for direct marketing purposes, unless (1) the recipient has specifically consented to receiving such promotions. This is sometimes called ‘a hard opt in’, or (2) the recipient’s details were obtained whilst purchasing a similar or related product or service to that now being promoted and the recipient was given the opportunity, when his details were collected, to opt out (without charge) of receiving further communications, and is given the same opportunity in each subsequent communication. This is sometimes called a ‘soft opt-in’.

1. The Executive received 76 consumer complaints in respect of the Sex Dates service, 52 of whom specifically indicated to PhonepayPlus, that the SMS messages received from the service were unsolicited. None of the complainants reported to have knowingly opted-in to receive marketing for the service. The Executive requested the service provider supply information in order to assist the investigation, including an explanation as to how 18 complainants had opted-in to receive promotions for the

service. The service provider stated that opt-ins varied from 3rd party purchases from companies such as News International and Monster mob (hard opt-ins) and opt-ins obtained as a result of consumers having provided their details whilst using previous Antiphony services (soft opt-ins). The Executive spoke to four of the allegedly opted-in complainants, three of whom stated that they had had never used the opt-in method specified by the service provider, namely via use of the website www.text-date.com. The remaining complainant could not specifically recall whether or not he had used a WAP site. The Executive considered that the service appeared to have sent SMS messages to users, for the specific purpose of direct marketing, which if found to be unsolicited would constitute an offence of Regulation 22.

2. The information provider noted the significant volume of complaints received by the Executive. In its defence, it pointed out that the complaints had been collated over a seven month period, which was an average of 10 complaints per month. The service provider stated that during each month of operation since March 2008, the service regularly received around 1000 new active users. The complainant ratio therefore represented 0.01% of the total user base each month. The information provider also pointed out that a significant and disproportionate number of the complaints had originated from the 02 network. The reason being that since February 2008, rather than providing complainants with the service provider's contact details, 02's call centre had been referring consumers directly to PhonepayPlus. This provided no opportunity for the service provider to address the consumer complaint directly.

The information provider emphasised that it took great effort to provide a good level of customer service, including live in-house telephone complaint handling and a willingness to provide a generous level of goodwill refunds to complainants. The information provider asserted that it had provided good, undisputable opt-ins for the majority of the consumers requested by the Executive. The information provider noted that three users in question were collected through its website www.textdate.com. The website promoted a web-to-mobile version of its 'chat and date' service. To use the website, consumers entered their mobile number into a dialogue box, and then receive a text-message follow-up to join the service. The information provider stated that the website was essentially another way of advertising services, in addition to print, TV etc. The information provider commented that the website was a 'store-front'; consumers entered their mobile numbers were sent a free message, to which they were invited to respond to register for the service. The information provider did not consider that there was anything fundamentally wrong with the format, nor did it believe it constituted a breach of paragraph 5.2 of the Code or any general law.

The information provider believed the Executive to be suggesting that the complainants never entered their mobile number into the site and/or that these might have been entered by other people/by accident/not at all. Whilst the information provider accepted that this was quite possibly the case, there was nothing which prevented the operation of a web-to-mobile service in this specific manner. The information provider understood this issue was likely to be addressed (and restricted) in the forthcoming Mobile Review, and welcomed clarification. The information provider agreed there was some risk of consumer harm, or at least confusion, in the event that a user received a free message because their number was accidentally or maliciously entered in to a web-site form. The information provider emphasised that the vast majority of recipients were previous users of its own services, or adult mobile content services from its sister company. Exceptions to the rule were users from its 3rd party partners, and users sourced from its text-date.com website.

3. The Tribunal considered the evidence and determined that, on the balance of probabilities, promotional messages had been sent to consumers, who had not provided consent, either directly or indirectly, to receiving the service. The Tribunal did not consider that the information provider had sufficiently demonstrated valid consumer opt-ins and therefore it concluded that the messages received by complainants were unsolicited and in breach of the Regulations. The Tribunal upheld a breach of paragraph 5.2 of the Code.

Decision: UPHELD

ALLEGED BREACH TWO

MISLEADING (Paragraph 5.4.1a)

*“Services and promotional material must not:
a mislead, or be likely to mislead in any way...”*

1. The Executive considered the service to be misleading for the following reasons:

Reason 1

The service operated by sending free marketing SMS messages from the short codes 69003, 89727 and 69844, with the purpose of encouraging recipients to enter the Sex Dates service. If the recipients of the messages did not respond, the service sent a further Teaser message, in an attempt to engage recipients to reply to the service.

The Teaser message was sent to consumers 30 minutes after the initial SMS promotion, via a mobile long number. The Executive noted that as mobile long numbers looked like genuine mobile numbers, consumers appeared unable to differentiate between the two. The Executive considered that the 076 mobile long numbers had misled complainants into responding to the SMS messages and into providing their age, when persistently asked by the service to do so. This resulted in the consumer being opted-in to the service and receiving reverse billed SMS messages, at a cost of £1.50 per message.

The Executive noted that the Teaser message did not state or give any indication that the service was subscription based, other than “see terms in previous message”.

Example 1:

*447624800358
Hey hunnie, its Laurie – what you up to? Im all by myself, could do with a playboy for the night X :-) terms in previous message*

Example 2:

*447624800370
Hi babes its Ami. I just got out of the bath and its too hot to wear any clothes in my flat now! What you up to? Want me to take a pic for you? X ;-) terms in previous message*

The Executive commented that there were many examples within the logs of the above type of message. The Executive could find no occasion whereby the initial SMS sent from a short code, had triggered a response. Responses were only sent following the receipt of a Teaser message, which the Executive considered evidence that consumers were misled into thinking that they were talking on a personal level to

a genuine female user, as opposed to interacting with a commercial premium rate business. The following examples taken from the logs substantiated the Executive's assertion that consumers were unaware they were interacting with a premium rate service:

Response to Example 1:

'Ooops sori laurie u've got the wrong number what a pity I could do with a playgirl'

Response to Example 2:

'I don't think I know anybody called ami but you can send me a pic if you want!'

Other consumer responses included: "U got the right person", "Ummm.. who was that msg meant for, who are you....? I think you may have sent it to the wrong number", "Who is it", "That would be nice but methinks u meant to send that to somebody else lol" and "Who is this". The Executive considered that the mobile long numbers had been used with the deliberate purpose of misleading consumers, who were unable to make a distinction from standard mobile numbers.

Reason 2

The Executive observed that as the service was adult in nature, the information provider was required to verify that users were over the age of 18 years old, before they entered into the service and were charged for use. The logs appeared to demonstrate that complainants had been coerced and misled into providing their ages to the service, in view of the fact the requests were sent from mobile long numbers. The consumers appeared to fail to appreciate that the messages were sent by a business, and the effect of their response, would be to enter them into a premium rate service. The following message was sent from the service ("S"), via a mobile long number "I think we met at a party. How old r u? X" to which the consumer ("C") responded "Sorry sweetheart you've been given a wrong number! It wasn't me". The conversation continued as follows: (S) "its Ami frm Newcastle... waitress..looking 4 some1 who can show me something new and hot...wat abt u my heart?xxx", (S) Hey Babes! My name is Ami! Im blonde 26 how old are you? Want to see my saucy pic? Tell me your age 1st cos it's a bit naughty! LOL! Xxx, (S) Hi there u never did reply to my txt! I am a bit bored and feel like sum fun! What bout u? So how old r u and what u in2 babe? Ami xx , (C) Tell me more about yourself first and how did you get my number? (S) I'm ami and I'm 26 and I'm from Newcastle –so how old are you?xx (C) I'm 48 and I don't know anyone from Newcastle!

As a consequence of the consumer supplying his age, he was entered into the Sex Dates service and started receiving reverse billed messages until sending 'STOP'. The Executive considered that the complainant was misled into providing his age, unaware that it was to a premium rate service. The messages received from the 076 mobile long numbers, persistently requested his age without notifying him that he would then be entered into the service. Other complainants who had been coerced into providing the service with their age had shown their frustration by sending messages such as "Please don't send anymore", "Stop now this is my little girls phone if I get you I will hurt you bad" "Ok I see now no thanks", all of which indicated that the complainants had been misled into entering the service.

Reason 3

The Executive noted from the SMS logs, that when complainants received reverse billed messages from the service and text the key word 'STOP' to the short code, they were sent the following message in response, which confirmed that the service had been stopped:

"SEXDates! FREE MSG OK we wont send u any more msgs. You can start again by sending MORE. Take care and come back soon!"

The Executive observed that one frustrated complainant sent other messages in response, for example:

"I would like a refund of the money you have been taking off my phone credit mobile number 07760169330. as I requested for you to stop this service by tex"

and:

"WHY HAVE YOU SENT ME A MESSAGE THAT WILL TAKE MY CREDIT WHEN I TOP UP? CONTACTING POLICE FOR HARRASSMENT OK"

The above messages served to opt the complainant back into the service and resulted in the continued receipt of chargeable reverse billed text messages. The Executive also noted that the message provided by the service specifically stated the requirement to send the word "MORE" to re-enter the service. The complainant's messages did not contain the word "MORE" and the content was clear that re-entering was not his objective. The Executive considered that service's opt-in policy and keywords, took unfair advantage of the complainant.

2. The information provider noted that the Executive's charge was that the information provider's use of a mobile long number during the promotional process was misleading, on the grounds that it confused consumers into thinking that the message originated from a friend or member of the public, and was detached and unrelated to the commercial chat and dating service. The information provider commented that this was despite the following: 1) all recipients received the initial promotional message from the short code containing all pricing, contact and stop information within 30 minutes of receiving the Teaser follow up message, 2) the Teaser message contained the explicit statement "see terms in previous msg" or "terms in previous msg".

The information provider stated that when it designed the promotion, it intended consumers to respond to the first message and register. The second message was designed as a quick follow-up to consumers, who had not found the first promotion sufficiently appealing. Given that the Teaser message followed so closely from the first promotion, the information provider felt it would almost certainly be linked back to the first message in consumers' minds, and therefore it was sufficient to contain a reference to "see terms in previous msg". The information provider also commented that the average user would only receive a couple of general promotional texts per month, in which case two chat messages, received within 30 minutes of each other, would be expected to be linked up in an average user's mind, particularly when the second message referred back to the first.

The information provider asserted that the terms contained in the first promotional message were clear and unambiguous; the reference in the follow-up message to "see terms in previous msg" was clear. It asserted that the time-gap between both messages needed to be a minimum of 30 minutes, in order to allow consumers time

to respond to the first message, but short enough so that that consumers would know the messages were linked. It was precisely because of these mechanics, that the information did not consider the use of a mobile long number in message two, to be misleading.

The information provider explained that the mobile long number was used for three reasons: 1) To entice consumers, bearing in mind the fantasy element related to all mobile interactive services. In the information provider's experience, the entertainment aspect of the service was heightened by the use of mobile long numbers. It asserted that there was a difference between enticing users and misleading them. The pricing mechanics described above were designed to ensure there could not be significant risk of the average user being misled by the long number, coupled with the fact that it was an adult service, promoted to informed adult males, many of whom had previously used mobile interactive services, 2) To make it clear to the user that the follow-up message was not chargeable, 3) The mobile long number was a fundamental element of the live service for the following reasons, a) It enabled users to reply directly to other users, without the need to prefix each message sent with the other users' destination nickname, b) Users knew the message they received from the long number was free; the pricing was a combination of £1.50 messages and free messages, to make a lower price-point per message received by the user of 75 pence or 50 pence, 4) Perhaps most importantly, the information provider's use of long numbers in the SMS promotion of chat and dating services was tested by PhonepayPlus in November 2007, in case reference 714769. The service operated with very similar promotional mechanics to Sex Dates. The Executive tested the Antiphony promotional mechanic against the Code of Practice, and chose to take no further action; the information provider understood that the case was closed in February 2008. The information provider commented that it was unaware of the use of mobile long numbers, to be in breach of any regulation and noted the matter would be dealt with in the upcoming Mobile Review.

Reason 2

The information provider stated that it was normal practice for text chat and dating services to be able to activate users, once they had provided their age. It had provided detailed training to its moderation team to ensure it obtained the consumers' age, prior to engaging them in any chargeable chat or adult chat. In terms of some consumers being "coerced" to provide their age, the information provider agreed that on limited occasions, the moderators responsible for age checking had acted outside of the training manual guidelines, by repeating an age-check question to a consumer who had sent in a message clearly stating they did not wish to be part of the service e.g. "leave me alone". The information provider stated that any consumer sending in STOP or STOP ALL would be automatically removed.

On occasion where such incidence had arisen the information provider ordered the immediate re-training and close supervision of the moderator, or had dismissed any moderator guilty of the breach more than once. The information provider emphasised that when dealing with human beings not computers, occasional processing errors had to be accepted.

The information provider believed that the test under paragraph 5.4.1a was not about long numbers or how the consumers' age was collected, it was a question of whether the service supplied sufficient pricing and terms within the promotion, to enable the consumer to make an informed choice.

Reason 3

The information provider stated that its chat platform had been engineered to allow users flexibility. It explained that the platform was primarily designed to support text dating; interaction between a male and female user base, which operated as a 'community'. As with any community, it viewed the relationship with the user, and between users, as potentially long term. The platform had therefore been designed to effectively put consumers' usage on hold by sending STOP. Sending STOP halted the service and billing, but did not permanently remove the consumer from the service. The consumer could easily rejoin or reactivate their session by sending another message into the service. This might be the keyword MORE, or it might be a direct message to a female they were last speaking to. The information provider considered the design allowed consumers to turn-off their service e.g. at night, but to resume it easily again in the morning, without losing established relationships. The information provider confirmed that users could send in any word to re-start the service, not merely 'MORE'. It concurred that in the example provided by the Executive, it had the unintended effect of reactivating the service. The information provider defended the design of its system, but agreed that for the design of this particular service, the feature was more likely to cause unintended reactivations, which was not intentional. The information provider had refunded consumers who complained of being reactivated in such circumstances, and confirmed that it had modified its service, so that only the keyword 'MORE', could reactivate the session.

3. The Tribunal considered the evidence and concluded that the use of mobile long numbers was likely to mislead consumers into believing that they were engaging with an actual user, as opposed to a commercial enterprise. The Tribunal considered this evidenced by the fact that none of the consumers responded to the initial promotion sent from a short code. The Tribunal was also persuaded by the message logs where it was clear that consumers thought they were responding to an individual and not engaging in a service. The Tribunal also considered the service's attempts to elicit an age confirmation from consumers, to be misleading; at no point was it made clear that in consumers' supplying their age, would result in their subscription to the service. The Tribunal also considered the means by which consumers were able to inadvertently reactivate the service, to be misleading. The Tribunal upheld a breach of paragraph 5.4.1a of the Code.

Decision: UPHELD

ALLEGED BREACH THREE

PRICING INFORMATION (Paragraph 5.7.1)

"Service providers must ensure that all users of premium rate services are fully informed, clearly and straightforwardly, of the cost of using a service prior to incurring any charge."

1. The Executive considered that the service was in breach of paragraph 5.7.1 of the Code, for the following reasons:

Reason 1

During the Executive's monitoring of the service, it entered the service by sending 'Hello' and an age of 33. The Executive then received the following message:

'You have submitted an age of 33 and are eligible to chat & date. You have now been registered to the service, to stop reply STOP. Helpline 08714742804'

The Executive subsequently began to receive chargeable messages from short code 69003, but at no point had been made aware of the cost of the service, prior to being

charged. The message received during monitoring contrasted with the following example provided the service provider, in its response to a request for information request under paragraph 8.3.3:

*'You have submitted an age of 41 and are now registered to chat&date.
Welcome 2 Sex Dates! Texts received cost 75p each (min £1.50) rply STOP
to quit. Help 0871474204'*

Reason 2

The Executive noted from the call logs and its own monitoring, that the service operated in the following manner. Consumers stated their age in a response SMS, which resulted in their entry to the service. The service sent out a welcome message to the consumer explaining the terms and conditions of service, in most cases this included a form of pricing. The service then sent the consumer one free message from the 076 mobile long numbers, which was followed up by the receipt of a £1.50 reverse billed SMS from the short code.

The Executive noted that the service welcome message contained the following wording:

*'Welcome 2 Sex Dates! Texts received cost 75p each (min £1.50) rply STOP
to quit. Help 0871474204'*

The Executive noted that messages sent from the 076 mobile long numbers were free, and those sent from the short code, cost £1.50 per message received. The Executive considered that the wording of the pricing information which stated that texts cost 75 pence each, was incorrect and not displayed in a clear and straightforward manner, as consumers could not at any time pay 75 pence. The Executive noted that the service had no means of charging 75 pence per SMS; it could either send a free SMS or one which cost £1.50.

2. The information provider responded to the Executive's allegations as follows:

Reason 1

The information provider commented that the Executive's argument was made in reliance upon its testing of the service, by which it initiated the service by sending in an age. The information provider emphasised that the service was not initiated by the receipt of a promotion sent by the information provider. The information provider stated that as the pricing for the service was contained in the promotional messages, and as the Executive initiated the services itself, it would not have received the promotional messages, as a response to this service was only intended whereby the consumer had received a promotional message. The information provider emphasised that the service had not been designed for consumers who text in their age at random. For this reason, the registration message received by the Executive was not the same as the registration message received by all regular users, in that it omitted pricing information in respect of the service. The service provider commented that its SMS platform was designed to offer a wide variety of services, which included out-of-date print adverts which advertised "send in your age to join the service". Those print adverts carried full pricing and terms. In view of the fact that the Executive sent in an age out of the blue, it considered that the tester was signed up for a different service. The out-of-date service did not include full pricing in the registration message:

'You have submitted an age of 33 and are eligible to chat & date. You have now been registered to the service, to stop reply STOP. Helpline 08714742804'

This service was not designed to be used in the manner tested by the Executive. No other user would simply send in their AGE out of the blue unless responding to one of our out-of date print advertisement. The information provider considered the Executive's allegation of a breach, to be unfair.

Reason 2

The information provider stated that consumers paid an average of 75 pence per message received. This was achieved by sending 1 x free message (from the long number) and 1 x £1.50 message (from the short code). This resulted in the consumer paying £1.50 for two messages, being an average of 75 pence per message and did not result in over charging. The user is only billed £1.50 when the second 75 pence increment was due to be charged. The information provider understood from recent compliance advice received from the Executive regarding this service, that the Executive was not willing to recognise the simple logic behind the above pricing design, in that it enabled the information provider to offer messages at a cheaper rate to consumers than competitors, who predominantly charged £1.50 per message.

The information provider commented that it had been operating this type of price averaging since 2005 without event, and that this was the first time the Executive had picked it up as an issue. Whilst the information provider found this stance regrettable, on the basis that it stifled innovation and the information provider's ability to offer genuinely cheaper services, it was implementing a new pricing policy as follows:

18+ only. Free registration & free first match, thereafter service costs £1.50 per two messages you receive, reply STOP to quit. For help call 0871 4742804 or email support@antiphony.net. Antiphony PO Box 2952 London WC1N 3XX. Standard network rates apply.

Cost £1.50 per 2 txts u receive rply STOP to quit. 18+ Antiphony help 08714742804

The information provider stated that it was seeking compliance advice as to this approach, but in the meantime, had implemented it across all of its services and advertising (subject to print lead times). The information provider emphasised that this was not an admission of guilt under paragraph.7.1, as it considered the original pricing to be perfectly clear, and not in any way unfair or misleading. The information provider had implemented the changes, as a measure of its intention to provide the clearest possible pricing information to consumers.

3. The Tribunal noted that whilst there appeared to be a breach in respect of reason 1, normal users would not have proceeded in the manner tested by the Executive. However, the Tribunal did consider that consumers had not been informed of the cost of the service, in a clear and straightforward manner. The Tribunal concluded that the average pricing method was outside the normal user experience, unclear and likely to confuse (reason 2). The Tribunal upheld a breach of paragraph 5.7.1 of the Code.

Decision: UPHELD

ALLEGED BREACH FOUR

CONTACT INFORMATION (Paragraph 5.8)

“For any promotion, the identity and contact details in the UK of either the service provider or information provider, where not otherwise obvious, must be clearly stated. The customer service phone number required in paragraph 3.3.5 must also be clearly stated unless reasonable steps have previously been taken to bring it to the attention of the user or it is obvious and easily available to the user.”

1. The Executive noted from the SMS logs and from its own monitoring of the service that promotional messages had been sent from the short codes, and then 30 minutes later, if consumers had not responded, a Teaser promotion was sent from the 076 mobile long numbers. The Executive noted the Code requirements that any promotion must clearly state the service or information provider contact details, and the failure of those messages to include the requisite information. An example message from the short code is as follows:

69003

‘Make hot dates sexy with singles in ur area now! Reply NOW to start 18+ only. Free reg then just 75p per text rply STOP to quit. AL Helpline: 08714742804’

An example of the Teaser message sent from a mobile long number:

07624800370

‘Hi babes its Ami. I just got out the bath and its too hot to wear an clothes in my flat now! What you up to? Want me to take a pic for you? X;-) terms in previous message’

The Executive commented that both of the above examples of promotional messages were consistent throughout all the complainant logs received by the Executive. The Executive also noted that the Teaser message sent from the 076 mobile long number, failed to include the requisite customer service number. Whilst the message did indicate that terms were in the previous message, the investigation demonstrated that complainants were not making the link between the two promotions.

2. The information provider concurred that the name of the information provider, ‘Antiphony’ was not clearly referenced in the initial promotional message, but that the shortened reference ‘AL’ had been included, which it accepted was a procedural oversight. Also, the PO Box number had been removed in favour of the customer care number. The information provider commented that in its experience, the PO Box reference was of no practical use to consumers, who preferred to make contact via the phone line. The information provider commented that the second message did refer consumers back to the first message, and as all consumers had received the first message, they had been sufficiently served with the necessary information (subject to the incorrect abbreviation of ‘AL’). The information provider emphasised that these were not two separate promotions. The messages were in respect of the same service, were sent to consumers within 30 minutes of each other, with a link back from the second message, by means of a statement to “see terms in previous msg”.
3. The Tribunal considered the evidence and noted the service’s failure to include the identity and contact details of the service or information provider, in the promotional material. The Tribunal commented that the reference to “AL” instead of Antiphony

was unacceptable. The Tribunal also noted the absence of a customer care number in the Teaser message. The Tribunal upheld a breach of paragraph 5.8 of the Code.

Decision: UPHELD

ALLEGED BREACH FIVE

INAPPROPRIATE PROMOTION (Paragraph 5.12)

“Service providers must use all reasonable endeavours to ensure that promotional material does not reach those for whom it, or the service which it promotes, is likely to be regarded by them as being offensive or harmful. Service providers must use all reasonable endeavours to ensure that their services are not promoted in an inappropriate way.”

1. During the course of the investigation, the Executive received SMS logs and additional information from the service provider in respect of consumers’ purported opt-in to receive marketing material in respect of the Sex Dates service. Within this response were four records for mobile phone numbers belonging to complainants, who had reported the Sex Dates service to PhonepayPlus. The mobile numbers had apparently opted-in by using services owned by the information provider in the past (soft opt-in) and were therefore available to be marketed to. The information supplied in the service provider’s response demonstrated that after consumers’ initial opt-in, four complainants had received promotional material after gaps of 30 months, 25 months, 25 months and 19 months respectively. The Executive was concerned by the length of time which had passed between each of the consumers’ apparent opt-in to receive marketing from the information provider, and their actually receiving the Sex Dates promotions. The Executive considered that the promotions were inappropriate, as such a long time had passed between those consumers’ opt-ins and the sending of promotional material, it was likely that those consumers would have no recollection of having used the information provider’s services. The Executive commented that it would expect to see contact being made much sooner than after a two and a half year gap, as seen in one of the cases.
2. The information provider commented that the Executive’s argument relied upon on four specific consumers, and the original ‘good’ opt-in having in some way lapsed, due to the passage of time since it was first given. The information provider examined the rules governing how long an opt-in remained legitimate, and noted the advice provided by the Information Commissioner’s Office (“ICO”), which it believed to be generally enforced by PhonepayPlus and at least two of the mobile operators. It commented that the ICO advised that providing the opted-in user had received a communication (promotional message) from the provider at least once every six months, and had not replied stop or removed themselves from such promotion, then there was no limit (e.g. 18 months) on how long that opt-in remained valid. The information provider drew the Executive’s attention to the guidance at page six of the Regulations, published by the Information Commissioner’s Office:

“We do not interpret the phrase ‘for the time being’ as meaning that the consent must inevitably lapse after a certain period. However it will remain valid until there is good reason to consider it is no longer valid, for example, where it has been specifically withdrawn or it is otherwise clear that the recipient no longer wants to receive such messages. The initial consent will remain valid where there are good grounds for believing that the recipient remains happy to receive the marketing communications in question, for example, where the recipient has responded positively (that is, other than to object) to previous, reasonably recent marketing materials”.

The information provider commented that all of its opted-in users received regular free communications, unless they chose to opt-out of marketing, and stated that it understood there was currently no limit on how long it could continue communication. The information provider presented additional evidence to the Executive, which contained message logs showing that its sister company Connection Makers had sent consumers promotional messages at least once every six months. The information provider disputed that a breach of paragraph 5.12 had occurred and requested that if the Executive wished to continue to raise this breach, it should provide specific evidence as to which law or regulation had been contravened.

3. The Tribunal noted the additional evidence supplied by the information provider, that the numbers in question had been sourced from its sister company, who sent promotional material to consumers at least once every six months. Accordingly, there had not been long gaps between the opt-in and the sending of promotional material, and therefore the Tribunal concluded that the service had not been inappropriately promoted to consumers. The Tribunal did not uphold a breach of paragraph 5.12 of the Code.

Decision: NOT UPHELD

ALLEGED BREACH SIX

VIRTUAL CHAT SERVICES (Paragraph 7.3.3b)

“All virtual chat services must, as soon as is reasonably possible after the user has spent £10 of spend thereafter:...

b require users to provide a positive response to confirm that they wish to continue. If no such confirmation is given, the service must be terminated.”

1. The Executive considered that the service fell within the Code definition of a ‘virtual chat service’, and consequently, every time a user had spent £10, they must be required to supply a provide a positive response in order to confirm that they wished to continue using the service. The Executive also noted that the Code requirement that if no such confirmation was given, then the service must be terminated. The SMS logs supplied by the service provider demonstrated that for one particular mobile number, the user was charged via reverse billed SMS on 13 occasions via the short code 69003, between the dates of 26 March 2008 and 11 April 2008, without being given the opportunity to confirm that they wished to continue.
2. The information provider agreed that the consumer in question was successfully billed on 13 occasions between 26 March and 11 April 2008. However, it stated that during the same period, the consumer sent in a total of 11 MO SMS messages, continuing his chat session. The information provider did not consider that a ratio of 11 MOs to 13 billable MTs during the period, suggested that the consumer was withholding consent to the service continuing. The information provider asserted that the general practical application of paragraph 7.3.3b was to send the consumer a pricing confirmation message every £10 spent. If they continued chatting by sending in an MO SMS after receipt of the confirmation, that was deemed to be sufficient consent to continue the service. This information provider asserted that this was the general application of the vast majority of competitor services and as far as it was concerned, was de rigeur practise for SMS chat services. The information provider disputed a breach of paragraph 7.3.3b of the Code.
3. The Tribunal considered the evidence and noted that the service had failed to seek a positive response from users after each £10 spend, to confirm that they wished to

continue using the service. The Tribunal also noted that in the absence of this confirmation, the service had not been terminated as required by the Code. The Tribunal upheld a breach of paragraph 7.3.3b of the Code.

Decision: UPHELD

SANCTIONS

The Tribunal's initial assessment was that, overall, the breaches taken together were **serious**.

In determining the sanctions appropriate for the case the Tribunal took into account the following aggravating factor:

- There was material consumer harm (106 consumer complaints).

In mitigation, the Tribunal noted the following factor:

- The service provider and information provider both cooperated with the Executive when notified of the breaches.

Taking into account the aggravating and mitigating factors, the Tribunal concluded that the seriousness of the case should be regarded overall as **significant**.

The Tribunal therefore decided to impose the following sanctions:

- The information provider to remedy the breaches;
- A formal reprimand;
- A £30,000 fine.
- The Tribunal ordered the information provider to seek compliance advice in respect of the service, within 2 weeks from the date publication of the summary decision, such advice to be implemented within 2 weeks of receipt.